Cherry Hill Convalescent Center *and* 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board. Cases 4–CA–19682–4–CA–19761, and 4–CA–19941

November 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The questions presented here are whether the judge correctly concluded that the Respondent violated Section 8(a)(1) of the Act by making coercive statements about the consequences of unionization and violated Section 8(a)(3) of the Act by suspending and discharging Valerie Williams.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cherry Hill Convalescent Center, Inc., Cherry Hill, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On June 2, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent excepts to the judge's credibility findings and asserts that the judge's findings of fact and conclusions of law reflect bias. After careful review of the entire record, we find that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the administrative law judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), ''[t]otal rejection of an opposed view cannot of itself impugn the integrity of competence of a trier of fact.'' Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Margarita Navarro-Rivera, Esq., for the General Counsel.
Richard B. Slosberg, Esq., of Harrisburg, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard on February 20–21 and March 9–10, 1992, in Philadelphia, Pennsylvania, on General Counsel's consolidated complaint dated June 21, 1991 (Cases 4–CA–19682 and 4–CA–19761), and on General Counsel's further complaint in Case 4–CA–19941, dated August 19, 1991.[1] The complaints allege violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), in that Respondent, on March 27, 1991 (Tr. 346) at a meeting of employees, in order to discourage their support of the union, told them that (1) they were doing better before the Union was selected; (2) if it were not for the Union the atmosphere at Respondent's facility would be like a family; (3) the Union was trying to cut vacation time and health benefits; (4) Respondent's hands were tied and it could not do anything for the employees now; and (5) that Respondent could not answer questions because of the Union. Separately, it is alleged that on or about April 2, 1991, Respondent, in order to discourage employees from supporting the union, told an employee that (1) the employees could not get anything with the Union in the facility and (2) that the employees would be better off without the Union and would have what they wanted without the Union. The complaints further allege that, in violation of Section 8(a)(3) and (1) of the Act, Respondent, on April 23, 1991, unlawfully suspended its employee, Valerie Williams, and on July 10, 1991, unlawfully discharged Valerie Williams and thereafter refused to recall or reinstate her.

Respondent' filed timely answers to the above allegations, admitted certain allegations, denied others and denied the commission of unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. Briefs were timely submitted and duly considered.[2]

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, together with an evaluation of their testimony and other evidence of record, I make the following

FINDINGS OF FACT

I. RESPONDENT AS A STATUTORY EMPLOYER

The complaints allege, Respondent admits, and I find, that Respondent, at all material times a New Jersey corporation engaged in the operation of a nursing home in Cherry Hill, New Jersey, in the course and conduct of its business operations, derived annual gross revenues in excess of $100,000 and annually purchased goods valued in excess of $50,000 directly from points located outside the State of New Jersey. On the basis of the above admissions, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

[1] The underlying unfair labor practice charges, and amended charges, filed by the above-captioned 1115 Nursing Home and Hospital Employees' Union (the Union), were served on Respondent on April 5 and June 18, 1991 (4–CA–19682); on May 8, 1991 (Case 4–CA–19761), and July 19, 1991 (Case 4–CA–19941).

[2] Along with her brief, General Counsel submitted a motion to correct transcript, dated April 30, 1992. The motion, unopposed, is granted.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaints allege, Respondent admits, and I find that, at all material times, the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[4]

The General Counsel alleges and Respondent admits that the following unit of employees at the Cherry Hill facility constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees employed by the Respondent at its Cherry Hill facility, but excluding all technical, professional, managerial, confidential employees, license practical nurses, guards and supervisors as defined in the Act.

The General Counsel further alleges, and Respondent further admits, that not only was the Union certified by the National Labor Relations Board as the exclusive bargaining representative of the unit on September 28, 1990, but that by virtue of Section 9(a) of the Act the Union, at all material times, has been and is the exclusive representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Respondent's Cherry Hill facility, a multiwing, two-story nursing home, employs a total of about 110 employees, about 70 of whom are in the unit. The unit consists of about 20 nurses aides, the balance being dietary, housekeeping, maintenance, and receptionist employees. In addition, there are approximately 7 to 8 registered nurses and 10 to 12 licensed practical nurses (LPN). Respondent's operations are based on a 3-shift day of 8 hours per shift; the first shift, 6:45 a.m. to 3 p.m.; second shift, 2:45 p.m. to 11:15 p.m.; third shift, 11 p.m. to 6:45 a.m. The director of nursing office is on the first floor near the main entrance (Tr. 707; 812–813). The desk station for the charge nurse is on the first floor, about 20 feet from an exit leading directly to an adjoining employee automobile parking area.

As above noted, on September 28, 1990, the Union was certified as the unit's exclusive collective-bargaining representative and there followed five collective-bargaining sessions between November 13, 1990, and March 27, 1991. The Union's bargaining committee at the negotiations consisted of the alleged discriminatee, Valerie Williams, a nurses aide or nurses' assistant, together with at least six other unit employees and the union business agent, Nat Hall (Tr. 17–19). Although Valerie Williams was named (by Nat Hall) chairman of the bargaining committee, there is no proof that Respondent was aware of her chairmanship. Respondent's bargainers were its president, R. Steven Scherfel, its controller Linda Lopez, its administrator and vice president, Gregory Marks, and its attorney. The collective-bargaining sessions occurred at night, before the date of Valerie Williams' April 24, 1991 suspension and her discharge on July 10, 1991 (Tr. 22).

B. *Alleged Independent Violations of Section 8(a)(1)*

1. Scherfel's March 27, 1991 speech to employees

At the 6 p.m. collective-bargaining session on March 26, 1991, Respondent's attorney gave Scherfel a letter to be distributed the next day (March 27) to employees. The text of the letter would form the basis of a speech by Scherfel to the unit employees following a meeting of employees on professional matters addressed by Director of Nursing (D.O.N.) Wilhelmina Long on the next day. A further bargaining session was scheduled for the evening of March 27. The letter (R. Exh. 11) was distributed to the employees following the afternoon staff meeting on March 27 and the instant complaints do not allege statutory violations for anything appearing on the face of the document.

Scherfel testified that the letter was prepared by Respondent's attorney, Larrabee, because a number of employees had inquired as to the status of negotiations, that the nurses aides constituted a majority of the bargaining unit, and that he took the opportunity, at the conclusion of the staff meeting, to bring the employees up to date with regard to how Respondent regarded the negotiations. He testified that he read the letter verbatim (Tr. 545), and had given a copy of the letter to the Union during the previous evening's negotiations and had inquired if the Union had any problems with the letter. Nat Hall told him that he had no problems with the letter.

After he read the letter, employees questioned when they were going to get a raise and how long they had to endure negotiations, but Scherfel refused to answer these questions.

The letter itself, dated March 27, 1991, advises the employees of the status of contract negotiations, notes that the letter had been given to the Union prior to its being read on March 27, asserts that in these five collective-bargaining sessions, there had been tentative agreement on some of the items but there were still ''open items.'' The letter states that for ''economic and business reasons,'' Respondent proposed a reduction in paid personal days off, vacation reductions, and changes in the sick pay practices as well as changes in break periods. The letter also mentions Respondent's desire to have employees share in the cost of hospitalization coverage and its having advised the Union, at the collective-bargaining session of March 26, that any proposed strike might

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[3] In both the consolidated and separate complaints, the Union is erroneously described as a labor organization within the meaning of Sec. 2(2), (6), and (7) of the Act. Those sections of the Act do not define ''labor organization,'' which is defined in Sec. 2(5) of the Act. Since it appears that this was a repeated error and led to no confusion or misapprehension at the hearing, or thereafter, I ignore the pleading and make the above finding.

[4] The complaints allege and Respondent admits that R. Steven Scherfel, president; Wilhelmina Long, director of nursing (D.O.N. Long); Gregory Marks, administrator; and Martha Aslarona, assistant director of nursing (D.O.N. Aslarona); are Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13), respectively, of the Act. At the hearing, Respondent conceded that its registered nurses are statutory supervisors (Tr. 316); that all of its registered nurses *and* LPNs are authorized to issue disciplinary warnings as part of the disciplinary machinery of the facility (Tr. 397–398); and that its RNs and LPNs are its ''first line supervisors'' (Tr. 399). I find, therefore, that all RNs and LPNs are Respondent's statutory supervisors and agents. As noted in the text, both LPNs and professional employees are excluded from the unit.

be in violation of legal notification requirements relating to health care institutions.

Testimony of the General Counsel's witnesses

(a) *Lerenda Matthews*: Matthews, a nursing aide employed by Respondent for about 2 years, and a member of the Union's negotiating committee, testified that she attended the payday, March 27, 1991 speech by President Scherfel at 2:30 p.m. in the main dining room. There were 15 nursing assistants present at the conclusion of D.O.N. Long's staff meeting and she told them to remain for Scherfel's talk (Tr. 320). As above noted, his speech occurred prior to a collective-bargaining session scheduled for that evening. (R. Exh. 11; Tr. 321).

While Scherfel admits that he told the employees in the speech that he wished that ''we could have remained as one big family'' (Tr. 547), a matter not directly or indirectly mentioned in the written version of this speech (R. Exh. 11), he denies that he said anything negative or derogatory about the Union (Tr. 547), and asserts that he did not answer employee questions on the advice of counsel (Tr. 548).[5]

Nevertheless, Matthews testified that in this speech, Scherfel said that the *Union* was taking benefits from the employees and that they'd be better off if there wasn't a union; that they would then be like a ''family . . . close and all of that.'' (Tr. 322.) On her reading the distributed letter during the speech, Matthews testified that she noted that whereas, in the speech, Scherfel said that the *Union* was taking benefits away from the employees, the letter stated that *management* would be taking the benefits away. Matthews insisted that, in the speech, Scherfel said that the *Union* would be taking the benefits away from the employees and that they would be better off without the Union (Tr. 323).

(b) *Inez Mitchell*, a nursing assistant, like Matthews, was present at the March 27, 1991 speech.

Corroborating Matthews, Mitchell testified (Tr. 338–339) that Scherfel said that the Union was trying to cut the employees' vacation time and benefits; that the Union was making decisions for the employees and some of their decisions were that the benefits would be cut; and that the facility was better off before the Union came in.

Discussion and conclusions

The issues presented are whether President Scherfel made the above extemporaneous remarks in his speech and thus, contrary to his testimony, he did not read the speech verbatim. These issues, of course, are not new or unique. It is clear that a party may not rely on a printed document to shield it from additional verbal remarks, made in a speech to employees, which do not appear in the document and which may, indeed, be contrary to the face of the document. See *NLRB v. Overnite Transportation Co*., 938 F.2d 815 (7th Cir. 1991).

The complaint (par. 8) alleges that the Employer violated Section 8(a)(1) of the Act by telling the employees in that speech that (1) they were doing better before the Union was selected; (2) if it were not for the Union the atmosphere at the facility would be like a family; (3) the Union was trying to cut vacation time and health benefits; (4) Respondent's hands were tied and couldn't do anything for the employees now; and (5) Respondent couldn't answer questions because of the Union.

The testimony of Matthews and Mitchell shows that Scherfel told the assembled employees that it was the Union, contrary to the statements in the printed document, which was trying to cut employee benefits rather than Respondent. They both also testified that he told the employees that they would be better off if there was no union and they were better off before the Union came in. Lastly, although Scherfel admitted telling employees, ''I wish we could have remained as one big family'' (Tr. 547), Matthews' testimony puts this statement in a more ominous setting: ''if it wasn't [for] the Union, we would [be] like a family, like we was, you know, close and all of that.'' (Tr. 322.)

Respondent failed to call any witnesses, whether from supervision or otherwise, to support or corroborate Scherfel's version of what occurred at the March 27 meeting nor did it rebut the credibility or veracity of Matthews or Mitchell, both current employees testifying in the presence of President Scherfel.

Although I take into account the written speech and Scherfel's admittedly inaccurate testimony that he stuck to it verbatim, I am reasonably confident in making a credibility resolution against Scherfel and in favor of the General Counsel's witnesses. While my observation and estimation of the General Counsel's witnesses (Matthews is a union bargainer) showed that they could have been mistaken with regard to what they actually heard, yet in terms of their acuity of observation and felicity in recollection and articulation, I was satisfied by their testimony, especially Matthews' simultaneous comparison of the text with the actual speech.

On the other hand, there is President Scherfel's uncorroborated testimony of what he *said* and my observation of his conduct at the hearing. His testimony was manifested by a glibness which, when coupled with numerous instances of evasive answers, gave rise to an attitude bordering on smart-aleckiness. While such demeanor itself detracts from confidence in the witness' credibility, it was accompanied, on at least several occasions, noted on the record, by open and repeated obstructive conduct. This misconduct, it became clear, was not based on sudden emotional factors which carried him away; rather, as I finally concluded at the hearing, and mentioned on the record, it manifested a pattern of interference with the proceeding so that facts might not be found to the detriment of Respondent.

Thus, as early as the cross-examination of the General Counsel's principal witness, the alleged discriminatee, Valerie Williams, it was necessary to cause Respondent's attorney to instruct Scherfel to refrain from speaking at counsel table in such a loud tone as to interfere with the witness and the General Counsel's ability to hear the answers (Tr. 239). Later on the same day, during the cross-examination of a further General Counsel witness, Scherfel engaged in the same conduct and was admonished a second time, with the warning that he was interfering with the proceeding (Tr. 334–335). On a third occasion, later in the hearing, Scherfel took to mocking the actions and speech of the General Counsel, admittedly mimicking her hand motions, her voice and intonations (Tr. 621–622). Lastly, late in the hearing, in order to further interfere with the General Counsel's cross-examina-

[5] Neither the author of the distributed letter (R. Exh. 11) nor the union business representative was present during the speech (Tr. 548).

tion, Scherfel again made comments loud enough to interfere with the proceeding. At that time, the fourth occasion on which he interrupted the hearing, it was clear to me that Scherfel was interrupting the hearing attempting to obscure testimony which might prove damaging (Tr. 798).

In short, when such misconduct is coupled with his uncorroborated testimony of what he actually said in the speech and numerous instances of evasive answers, I conclude that Scherfel's testimony was not trustworthy. Indeed, when measured alongside the testimony of the General Counsel's considerably less sophisticated witnesses, together with their interests and the possibility of error and exaggeration, I have no trouble in concluding that the General Counsel's witnesses were at least truthful regardless of their acuity of observation, memory, and articulation. I conclude that their testimony was credible.

With regard to the March 27 speech, certainly in the absence of any corroboration of Scherfel's testimony, I conclude that, as alleged, Scherfel told the employees that the *Union* was trying to cut employee vacation time and other benefits; that the facility was better off before the Union came in; that the employees would be better off if there wasn't a union; and that in the absence of the Union the employees and the employer would have remained a happy family. As alleged, I find that collectively these statements violate Section 8(a)(1) of the Act.

With regard to his statements that his hands were tied, I find that he did not also add that the employer couldn't give anything to the employees ''now'' (as an implied promise that, in the absence of the Union, the employer would reward the employees with benefits); and that his statement, if made, that he could not answer questions because of the Union, was not uttered. Rather, he refused to answer questions, as he told the employees, because of the advice of counsel. To that extent, the allegations of paragraph 8 of the consolidated complaint should be dismissed. Otherwise, as found, Respondent's remarks, made in addition to and contrary to the written distributed letter, violate Section 8(a)(1) of the Act.

2. Administrator Gregory Marks' April 2, 1991 conversation with Valerie Williams

About 5 days after President Scherfel's March 27, 1991 speech to the 15 nurses assistants, the alleged discriminatee, nursing assistant Valerie Williams, and Respondent's administrator, Gregory Marks[6] had a conversation on the first floor, near the nurses station (Tr. 26; 513). The balance of the occurrence, including the conversation, is in dispute.

Valerie Williams testified that while she was working in the hall, putting linens in a room, Administrator Gregory Marks came down the hall and approached her. After initiating an exchange of salutations, he asked her if she knew about the next union meeting. As above noted, both Marks and Williams are members of the negotiating committees. She testified that she told him only ''no'' that she knew nothing about the next meeting. Williams testified that Marks told her that ''Winnie'' [D.O.N. Wilhelmina Long] told him that ''your Union doesn't tell you all when there's another meeting'' (Tr. 27). She recalled that he then told her that ''without the union in here, we can't get what we want'' and that if ''we didn't have a union, we'd get what we wanted'' (Tr. 27, 28). When Williams asked Marks why they could not get a dollar raise, Marks answered that Respondent would not give the dollar raise ''because they don't have to give it to us'' (Tr. 27); that the employees were better off without the Union. She recalled that he remarked that he heard that all the employees wanted a strike to which she made no response (Tr. 153).

Gregory Marks testified that rather than his approaching Williams, Valerie Williams approached him (Tr. 513); that she asked him when the next union meeting was scheduled and that he told her that he was not sure (Tr. 513–514). At this point, according to Marks, Williams began telling him about problems she was having with the Union and the Union's failure to communicate with her. In particular, he said she told him that the Union did not keep her informed (Tr. 514). At that time, the parties were involved in collective-bargaining negotiations and Marks made meeting-room reservations at the Holiday Inn in Cherry Hill, New Jersey. Marks testified the he told Williams that she would have to get her information for the Union (Tr. 516–517).

Marks denied Williams' testimony: that the employees could not get anything with the Union present or that the employees would be better off without a union; or that the employees could get what they wanted if they did not have the Union. He also denied any conversation relating to a dollar raise or any other raise and also denied that their conversation involved the topic of a strike (Tr. 519).

Discussion and conclusion

My observation of Valerie Williams, contrary to Respondent's assertion that, inter alia, Williams was a spreader of false rumors among Respondent's employees, indicated that, if anything, she was rather secretive. Based on that conclusion, and from the absence of evidence to show, for instance, a disarmingly friendly and open relationship between Marks and Williams, I am unable to conclude that Williams would approach Administrator Marks and ask him about the forthcoming collective-bargaining session at which they would appear for their respective parties. I was also impressed with the spontaneity of Williams' testimony that Marks began his conversation with her by stating that ''Winnie'' [D.O.N. Long] told him that the Union doesn't tell the negotiators when there is another meeting (Tr. 27). This element of the conversation was not denied by Marks; but even if it had, I would nevertheless credit Williams that that is how the conversation started. If it did start that way, and I believe that it did, then I credit Valerie Williams' version of the conversation and conclude that, as alleged in paragraph 9 of the consolidated complaint, Marks, on or about April 2, 1991, in violation of Section 8(a)(1) of the Act, told Valerie Williams, in substance, that they would be better off without the Union; that without the Union, the employees would get what they wanted and with the Union they could not get what they wanted (Tr. 27–28).

[6] Respondent conceded that Administrator Gregory Marks, a corporate vice president, is the number 2 supervisor in its hierarchy, second only to President Scherfel in authority in Respondent's facility. He is superior to D.O.N. Long (Tr. 520).

C. *Alleged Violations of Section 8(a)(3) of the Act*

1. The April 24 suspension of Valerie Williams

As above noted, the nursing assistants worked three shifts 6:45 a.m. to 3:15 p.m.; 2:45 p.m. to 11:15 p.m. and 10:45 p.m. to 7:15 a.m. Those on the 7:15 a.m. to 3:15 p.m. shift record their medical notes on patient records in blue or black ink; those on the 2:45 p.m. to 11:15 p.m. shift, in green ink; on the 10:45 p.m. to 7:15 a.m. shift, in red ink. The parties are in dispute as to whether Respondent in fact supplied the pens to the nurses: Valerie Williams testified that Respondent did not; D.O.N. Long testified that she maintained a supply of these pens in her office. There was no other proof, other than Long's testimony, that the employees were either aware of or actually given these pens by Respondent and certainly no proof that Valerie Williams knew of or accepted these pens from Respondent. The issue, as will be seen, is immaterial.

In any event, on the afternoon of April 22, 1991, on entering the facility, Williams left her green pen in her car. Realizing that she did not have her pen to record notes, she turned to a nurses aide whose name she did not recall and told her, as was her practice when she forgot the pen and left it in her car, that she was going out to her car in the parking lot. At that time, about 2:45 p.m., there was a shift change and there were several nurses at the nurses' desk when she mentioned her trip to the car to the nurses aide. She did not tell the nurses at the desk. The distance from the nurses' desk station to the front door is about 20 feet; from the front door to her car was an additional 20 feet (Tr. 39). Williams then preceded to the car to get her green pen. While D.O.N. Long (director of nursing) testified that she maintains a stock of these pens, including green pens in her office; and that on more than one occasion, to her recollection, Williams has secured a green pen from her, Williams testified that the green pen in the car, was her own pen. Whether Respondent stocked the pens in Long's office, and there is no corroboration of Long's assertion, it is likely that Williams found a trip to her car, as was her practice, more convenient that going to Long's office to secure the pens. As hereafter noted, Respondent's assistant director of nursing (A.D.O.N.), Martha Aslarona knew of Williams' practice and never admonished against it. Nurses also saw her do it (Tr. 41).

Although there were two or three nurses at the nurses station at the front desk when she informed the nurses aide that she was going out to her car, Williams testified, without contradiction, that her own supervisor, Dolly O'Hara, had not yet reported to the nursing home at this time (Tr. 156–157). Williams merely notified a nurses aide that she was going out to the car.[7]

Out in the parking lot while getting her green pen, she met Charles Rivera, a union representative. She did not know that Rivera was in the parking lot when she left to retrieve the pen (Tr. 46), and did not know that Rivera would then give her some papers for distribution to the other nurses aides. They spoke for 10 minutes after Williams got the pen.

While Williams was speaking to Rivera, President Scherfel drove up in his car and had a conversation with Rivera in Williams' presence. Scherfel asked Rivera about anticipated picketing of Respondent's facility and whether there was going to be a strike (Tr. 163). Rivera told Scherfel that there would be no strike.[8] Williams remained in their presence for a few minutes during this conversation (Tr. 44) and then proceeded back to the building.

Unknown to Williams, President Scherfel had observed her talking to Union Agent Rivera and drove up to them in the parking lot to insure that they knew that he had seen them. Immediately after his conversation with Rivera, using his car telephone, he contacted the charge nurse in the facility (whose name he did not recall) and asked where Williams was. The charge nurse (actually A.D.O.N. Martha Aslarona) told Scherfel that Williams was in the facility attending patients. Scherfel told her that Williams was not in the facility and that she ''happens to be out [in] the parking lot and that he wanted the charge nurse to document the fact that he had called; that he had seen Williams in the parking lot; that Williams was ''obviously'' not on an approved break; and that the incident should be documented by the charge nurse and reported to D.O.N. Wilhelmina Long at the charge nurses' earliest convenience or as soon as Long came to the facility'' (Tr. 564–567).

As Williams reentered the facility through the main entrance doors, about 20 feet from the nurses desk, she heard the telephone ringing at the desk and said to the Assistant Director of Nursing Martha Aslarona, at the nurses desk at the time, that: ''I bet that's for me.'' After hanging up the telephone, Assistant Director of Nursing Aslarona told Williams that the telephone call was for Williams, that the caller was President Scherfel, and that Aslarona had to ''write her up'' for being out in the parking lot.

Aslarona, admittedly Respondent's supervisor and agent, then left Williams standing at the desk and went into the office of the director of nursing. There she ''wrote up'' the incident and telephoned Williams at the desk to come into the office (Tr. 49). In the office, Aslarona told her that she did not want to write her up but had to write her up because she had gone to the parking lot. Williams asked Aslarona what the effect of this written warning would be in view of prior written warnings that Williams had received. Aslarona told her that it should not affect her because the prior warnings had occurred a long time ago (Tr. 50); that the present warning would not go against her and that Aslarona knew that Williams had often gone to her car to get the green ink pen (Tr. 51). Nevertheless, she told Williams, since President Scherfel told her that she had to write Williams up, she had to do it (Tr. 51–52).[9]

[7] Respondent's personnel manual (R. Exh. 3), addendum 1, subpar. D., provides, inter alia, both that the employee must punch out and obtain supervisor approval prior to an employee leaving the building. The record is uncontradicted that Williams made it a practice of informing nurses aides when she was going out to the car and that other employees visited their cars in the parking lot for various reasons. Nurses aides were out in the parking lot, from time to time, smoking, speaking to persons giving them rides, and obtaining articles from their cars.

[8] To the extent Scherfel testified that he merely said ''hello'' to Union Agent Rivera, necessarily denying that he asked Rivera about picketing and rumors of a strike, I do not credit Scherfel's testimony.

[9] The two prior written warnings to which Valerie Williams referred were dated respectively September 24, 1990 (R. Exh. 8), and November 26, 1990 (R. Exh. 7). The September 1990 written warning, signed by Williams' supervisor, O'Hara, a registered nurse, was

The next day, April 23, 1991, Scherfel sought out and met with D.O.N. Long who affirmed that she had received information regarding the parking lot incident. Long told Scherfel that she knew that he was upset; that he had called the charge nurse; and that the charge nurse said that Williams was in the building tending to patients when she was not (Tr. 568).

Scherfel then asked Long what her position was on this incident and they discussed the severity of the infraction (Tr. 567). According to Scherfel, Long told him that she thought that the incident was not a severe one (Tr. 568), but it was her recommendation nevertheless to suspend Williams. There was no mention in Scherfel's testimony of Long having Williams' personnel file or telling him that she reviewed the filed prior to recommending to him that she suspend Williams. In any event, Scherfel testified that he agreed with Long's recommendation for a 3-day suspension and that he wanted the latter written up (Tr. 568–569).

D.O.N. Long's testimony supplied a substantially different version of Scherfel's participation in the Williams' suspension. Long testified that when she came to work in the morning of April 23, Aslarona gave her a copy of the written warning which Aslarona had drafted on April 22 (Tr. 680). After reviewing it, she reviewed Williams' personnel file for other disciplinary warnings and problems and then made her determination of the action to take (Tr. 681). After reviewing the records in Williams' file, she testified that she determined that suspension was in order (Tr. 682). Since Williams was not working on that shift (Apr. 23), Long removed Williams' timecard from the rack, the regular procedure to cause an incoming employee to visit the director of nursing to inquire concerning the lack of a timecard (Tr. 682). Long further testified that Williams visited her office later that day after Williams reported to punch in on the afternoon shift. They had a conversation in which Long ''counselled'' Williams because of the unauthorized break, leaving the facility and leaving the patients unattended (Tr. 683).

Long testified, however, that it was she who made the decision to suspend Williams because of her prior discussions with employees about leaving the facility, or their going on authorized breaks, because patient safety was involved. As this version on Long's direct examination demonstrates, there is clearly no active or even indirect participation in the suspension determination by President Scherfel; indeed, there is no Scherfel participation whatsoever in Long's decision to suspend Valerie Williams. It was not remarkable, therefore, on cross-examination, when the matter was particularly put to her, that Long testified not only that it was her decision, and her decision alone, to suspend Valerie Williams, but that President Scherfel had nothing to do with the suspension (''absolutely not,'' Tr. 714). Scherfel himself, testified that he had never previously been involved in the discipline of a nurses aide.

This unexplained contradiction between D.O.N. Long's and President Scherfel's testimony with regard to his participation in the decision to suspend alleged discriminatee, Valerie Williams, not only impacts adversely on Long's credibility, showing her testimony to be designed to protect President Scherfel from any participation in a disciplinary action which is the subject of the General Counsel's complaints; but, by the very contradiction highlights President Scherfel's active and entirely unique participation in the decision for suspension. Indeed, if President Scherfel's testimony is credited, that he sought out Long concerning her receipt of A.D.O.N. Aslarona's written warning, requested Long's recommendation and then approved Long's recommendation, for suspension, it can hardly be said that President Scherfel did not participate in the *decision* to suspend Williams (as Long testified). Further, to the extent Long's testimony suggests that he did not even participate in any *discussion* regarding the suspension (''absolutely not'') is even more suspect. I am constrained to conclude that Long's veracity was undermined; and that her testimony, understandably constructed to protect President Scherfel, was designed to insulate him from his admittedly unique participation in the Williams' discipline, which is the subject of the complaint. Yet Scherfel's more credible testimony indicates that *his* anger, noted by Long, drove *her* decision; and that his request for Long's recommendation and his agreeing with her recommendation sealed the discipline. On April 24, noting the two prior warnings, Long wrote up a 3-day suspension for the unauthorized break (G.C. Exh. 3(b)).

Discussion and conclusions

I conclude from the above that the General Counsel has proved a prima facie case of an 8(a)(3) violation in the April 24, 3-day Williams suspension. There is no dispute that Respondent, at all material times, *knew* that Valerie Williams was a union supporter and, indeed, was one of a half dozen of the 70 unit employees comprising the Union's collective-bargaining negotiation committee. I have found, above, that Administrator Gregory Marks' April 2, 1991 unlawful conversation with Valerie Williams, on the pretext of an approaching collective-bargaining session date, was redolent with union animus concerning the futility of Valerie Williams' support of the Union and indeed the detrimental effect of the Union on employee benefits and working conditions. Independently, I have found, above, that President Scherfel, himself, in his March 27, 1991 speech to assembled nurses' assistants, violated Section 8(a)(1) of the Act, placing the onus and responsibility on the Union for prospective cuts in vacations, benefits as well as other adverse terms and conditions of employment resulting from unionization and support

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the result of a nurse and Williams yelling at each other so loudly as to be distracting. They both refused to stop yelling at each other and failed to heed Supervisor O'Hara's direction that they settle their argument in the nursing office (R. Exh. 8). The November 26, 1990 warning was for ''insubordination; crocheting while on duty.'' In this written warning, Williams repeatedly refused to obey an order assigning her other work due to the departure of a coemployee. (R. Exh. 7.)

On the other hand, in Respondent's annual evaluation of Williams' performance as an employee, rendered on April 8, 1991, 2 weeks before her April 24, 1991 suspension, above, she was rated consistently a good employee, meeting Respondent's requirements (G.C. Exh. 6; Apr. 8, 1991). Director of Nursing Long testified that no nurses aide ever received consistently excellent evaluations and seldom receives any excellent notations whatsoever. In short, the April 8, 1991 evaluation of Williams, signed by D.O.N. Long, notes that her attendance, punctuality, attitude, compliance with personnel policies, dependability, initiative and motivation, knowledge of work, cooperation, conduct on duty, quality of work, quantity of work, compliance with instructions of supervisors, etc., were all ''good; meets requirement.'' Similarly, her ''overall evaluation'' was ''good.''

of the Union. Thus, the legal requirements of Respondent's *knowledge* of Williams' support of the Union and its union animus are present in this case, indeed some animus directed at Valerie Williams, in particular. When *knowledge and union animus* are coupled with the facts that the suspension for being out in the parking lot was (1) occasioned by the presence of Union Organizer Charles Rivera and (2) Scherfel's participation in the decision was both angry and unique, the prima facie case is further supported.

I am also not unmindful of another particularly troubling matter concerning Williams' April 24 suspension and her July 10 termination: the disciplinary memorandum or warning drafted by A.D.O.N. Aslarona on which both Williams' suspension and her later discharge were based. The face of the document contains Martha Aslarona's signature (''Martha Aslarona'' followed by ''RN A.D.O.N.''). It appeared to be an odd circumstance, however, to have an *additional* sentence appearing below her signature which would otherwise have terminated the document and shown its author (G.C. Exh. 3(a)). I inquired of Valerie Williams whether the additional sentence appearing after Aslarona's signature was on the document when Williams signed it. That sentence reads: ''Employee had been counseled regarding unauthorized breaks.'' Williams testified that that sentence was not on the document when she signed her name to it (Tr. 222–225). Not only was the sentence not on there when she signed it, but she never saw Aslarona add it and did not know how it appeared there (Tr. 226).

D.O.N. Long testified that she had not added the sentence; that it was not her writing and that it was Aslarona's handwriting (Tr. 708). Because Respondent failed to call Aslarona as its witness to explain the addition of this sentence to the disciplinary warning on which both the suspension and later discharge were based, there is no evidence to explain the addition of the sentence. Thus we do not know *when* it was added and under what circumstances Aslarona decided to state that Williams had been counseled regarding unauthorized breaks. What makes Aslarona's failure to appear particularly significant is Valerie Williams' uncontradicted testimony (elicited on cross-examination), supported by the records in her personnel file, that prior to Long's April 24 disciplinary warning for the unauthorized break, she had never been counseled or warned or even talked to about unauthorized breaks prior to that date (Tr. 226). Respondent, fully apprised of the testimony concerning this post hoc addition and its apparent falsity, nevertheless failed to procure an explanation from Aslarona or suggest a reason why responsive testimony was not procured. I therefore am constrained to conclude that the additional false sentence (''Employee had been counseled regarding unauthorized breaks'') was added by Aslarona after she procured Valerie Williams' signature on April 22; and that in view of D.O.N. Long's failure to testify that it was on the document at the time that she reviewed it on April 23 or indeed, when, on April 24, she drafted her note explaining the 3-day suspension, it was added even after that. (G.C. Exh. 3(b)).[10]

In Long's explanatory note accompanying the suspension (G.C. Exh. 3(b), she refers to the April 22, 1991 warning as the ''third warning'' which Williams received. The other two warnings in the file are apparently the two 1990 warnings (R. Exhs. 7 and 8). There is nothing in the file of any other warning or counseling for an authorized break as the added sentence on General Counsel's Exhibit 3(a) suggests. I therefore conclude that Aslarona added that sentence after Long decided on the suspension[11] and after the discipline had been awarded to Williams. While there is therefore no clear date on which the sentence was added, it becomes extremely material to determine that date since that document, showing a prior discipline for the same activity (G.C. Exh. 3(a)), was the fundamental basis on which President Scherfel admittedly discharged Williams on July 10, 1991 (Tr. 402–403). Under these circumstances, there is present the inference, in view of Scherfel's animus toward the Union in general, and Administrator Marks' unlawful remarks to Williams, in particular, that it may have been added at that time or after the discharge in order to further support that action. Finders of fact should be extremely sensitive in unfair labor practice litigation involving credibility disputes, to situations where the proof affirmatively shows, as here, Respondent's creation of false documentation. *WordsWorth*, 307 NLRB 372 (1992); *Quebecor Group, Inc*., 258 NLRB 961, 972 (1981). Even more so in the presence of a failed obligation to produce a witness (A.D.O.N. Aslarona) under its control, with knowledge of the facts, where there is a prima facie case of the witness' creation of a false document used in the subsequent discipline of an employee engaged in union activities. See *International Automated Machines*, 285 NLRB 1122 (1987).

I also note that nowhere in President Scherfel's *testimony*, concerning his car telephone conversation with the charge nurse (in which he noted that Valerie Williams was not taking care of patients but was out in the parking lot) is it suggested that he actually told the nurse that Williams was in the parking lot talking to Union Representative Rivera. Yet, in her memorandum (G.C. Exh. 3(a)), drafted at Scherfel's directions, Aslarona recorded the fact that Scherfel witnessed Williams talking to ''Carlos Rivera.''

Respondent's records regarding suspensions; 1987–1991

The General Counsel subpoenaed all of Respondent's records for the period 1987 through 1991 regarding suspended and discharged employees. In that period, the evidence shows that only two employees were suspended by Respondent. President Scherfel admitted that he does not get involved in the discipline of nurses aides and that there were only two suspensions of employees in that 4-year testified

[10] Not only are the unknown circumstances concerning the false sentence added after Aslarona's signature on G.C. Exh. 3(a) highly significant, but the testimony of the dates on which Long drafted her note memorializing the suspension and, indeed, the dates on which Williams was actually suspended, are in disarray. The only fact which appears not in dispute is that Long pulled Williams' timecard from the timecard rack and thereafter interviewed Williams on April 23, 1991.

Williams testified that she did not work that day (Apr. 23) but went home and was recalled to work on Friday, April 26. (Tr. 71–73.) Long which she drafted but thereafter corrected them to show that the actual suspension dates were April 24, 25, and 26 and that Williams returned to work on Monday, April 29. Williams testified that she was suspended April 23, 24, and 25 and returned to work on the 26. I cannot resolve the actual dates of suspension but find that there was a 3-day disciplinary suspension.

[11] Long testified that she had never suspended any employee for being out in the parking lot, but had suspended or terminated several employees for leaving the building (Tr. 715).

that she had mistakenly put dates on the suspension document period. Scherfel was involved in neither suspension. Neither of the suspensions involved employees going to the parking lot.

Benjamin Greene was suspended for 2 days in April 1991. In January 1991, he became involved in a loud argument with A.D.O.N. Martha Aslarona in which he accused Aslarona of raising her voice when she was merely trying to make him listen to her regarding his failure to perform an assignment. When Greene then took an unscheduled break leaving the floor with only one nurses aide instead of two, Aslarona decided that he had created a hardship on the floor and issued him a written warning for a ''bad attitude.'' On April 1, 1991, his whereabouts were unaccounted for for approximately 20 minutes, after being paged several times without response. He was found to be using the telephone in the residential section with the patients unattended. It was this second warning which caused Wilhelmina Long to record Green's unsatisfactory work, giving him a 2-day suspension without pay (G.C. Exh. 26). It should be noted that thereafter, on July 13, 1991, he was given a disciplinary warning for being in a patient's room for 1-1/2 hours and was found to have been on an extended break. He was merely docked 1-1/2 hours from his pay.

Lucile Bell was suspended on May 25, 1988, for 1 day and placed on 2 months' probation because of *excessive absenteeism* (G.C. Exh. 37). Her disciplinary record (G.C. Exh. 37) shows that on February 20, 1988, Bell took a lunchbreak and left the floor without coverage by other employees. On April 15, 1988, she received a further verbal warning for *excessive absenteeism* with the notation that continued infractions would read to suspension. About a month later (May 25, 1988), she was suspended for 2 days with 2 months' probation. She had been absent on May 20, 1988, and the subsequent May 25 warning for excessive absenteeism contains the admonition that continued abuse of absenteeism would result in termination.

There is thus no showing that any employee, like Williams, who went to the parking lot for a work-related purpose (retrieve her pen) was ever suspended. In Valerie Williams' case, it is actually unnecessary, however, to meet the issues of her unauthorized absence from the work floor or her leaving the building as unlawful acts under Respondent's personnel rules or practice. Williams' uncontradicted and credited testimony was that Assistant Director of Nursing Martha Aslarona *knew* that Williams often had gone to her car in the parking lot for the green pen and had not written her up adversely on those occasions. Indeed, Aslarona told Williams, on April 22, that she was not writing her up of her own volition, but was directed by President Scherfel to write her up. Again, Aslarona was not produced by Respondent though it had an obligation to do so.

While it is true that Williams' testimony is uncontradicted and credible, I nevertheless draw a further adverse inference derived from Respondent's failure to produce Aslarona to meet a the General Counsel's evidence of Aslarona's *condonation*, if not *approbation*, of Williams' frequent visits to her car in the parking lot. I find that Aslarona's reluctance to administer an unmerited warning, Scherfel's insistence that Williams be written up, his angry initiation of, and unique participation in, the disciplinary suspension of a mere nurses aide by D.O.N. Long on the next day (Apr. 23), all in the light of the General Counsel's proof of Respondent's (Scherfel's) union animus and Marks' engaging in unlawful acts, directed against Williams, demonstrated not only that the General Counsel proved a prima facie case. I find that A.D.O.N. Aslarona's reluctance affects Respondent's defense, that it suspended Williams solely because she was in the parking lot in violation of Respondent's rule against leaving the building. That defense is thereby rendered not sufficiently persuasive under Respondent's burden of proof of its affirmative defense imposed in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). I find that Respondent neither rebutted the prima facie case nor would have suspended Williams even if she had not been a union bargainer. *NKC of America*, 291 NLRB 683 (1988).

The uncontradicted evidence is that other employees are regularly out in the parking lot without disciplinary action. The fact that there is no specific proof of Respondent's knowledge of the activities of these employees does not necessarily support Respondent. The frequency of the employees' appearance in the parking lot to obtain chocolates, to smoke, to speak to their prospective transporters, etc., bespeak the likelihood that Respondent knew of this practice. With regard to Valerie Williams visits to the parking lot, however, there is no question of Respondent's knowledge. A.D.O.N. Aslarona had actual knowledge of Valerie Williams' repeated visits to the car to retrieve the pen and, as above noted, if she did not actually approve of that practice, she necessarily condoned, without discipline of any kind, Valerie Williams' activities. Aslarona, at most, regarded Williams' repeated leaving the facility to retrieve her pen from her car as trivial departures from Williams' duties, not calling into play the disciplinary prohibitions in the personnel manual, supra. Even this, however, must be viewed in the light of Williams going to the parking lot not to get candy but to get her pen—an act in furtherance of her duties. In the presence of Aslarona's knowledge of Williams activities, I am unable to conclude that Respondent was merely indulging in a harsh, but even-handed, discipline in suspending her.

The two suspensions of record do not support Respondent's defense under *NLRB v. Transportation Management*, supra. Neither is remotely analogous to discipline imposed for being in the parking lot with the supervisor's acquiescence for prior acts, for a reason associated with Respondent's business (retrieval of the green pen). *Benjamin Greene* was given a written warning for arguing with A.D.O.N. Aslarona on January 17, 1991, raising his voice to her and being absent on a lunchbreak which was not authorized. Six weeks later, on April 1, 1991, he received a 2-day suspension without pay for using a telephone and not attending too work, leaving the patients unattended for 20 minutes. Williams, on the contrary, was retrieving a pen in order to work. Greene, having been insubordinate to his supervisor, was using the telephone for 20 minutes for reasons not disclosed on the record. In short, he was not out in the parking lot retrieving a pen so he could record notes on the Respondent's records, part of his duties (as did Valerie Williams).

With regard to *Lucille Bell*, she was suspended for *absenteeism*. This has nothing to do with being out in the parking lot for a few minutes or trying to retrieve a pen in order to do her job.

I conclude, therefore, that, in the presence of the General Counsel's prima facie case consisting of Respondent's (1)

union *animus*, (2) *knowledge* of Valerie Williams' union activities, (3) the immediate write up and subsequent unique suspension flowing from her being out in the parking lot attempting to retrieve a green pen to perform Respondent's business, an action condoned if not approved by Aslarona, (4) there meeting without prior arrangement, a union agent, (5) seen by President Scherfel in doing so, Scherfel, by his unique personal intervention, having her suspended on the next day by D.O.N. Long, Respondent violated Section 8(a)(3) and (1) as alleged. Again, not only did A.D.O.N. Aslarona know of, and at least *condone* Williams' repeated prior visits to the car to retrieve her green pen in order to do her work, but, according to Williams' credited and uncontradicted testimony, Aslarona admitted that, consequently, she was drafting the adverse memorandum not of her own volition but only at the direction of President Scherfel. The testimony of President Scherfel, undermining Long's contrary version, shows his unique participation in the discipline of a nurses aide. I do not credit her testimony concerning Respondent's motivation in the suspension. Because Respondent's records reveal no suspensions for an employee being out in the parking lot in order to effectuate employer business functions, but rather for excessive absenteeism and disappearing from the work floor while talking on the telephone; or for being on the telephone for 20 minutes after arguing with the assistant director of nursing, these are not suspensions which show equal or parallel discipline as that accorded to Williams. Respondent has not shouldered its burden of proof to show that it suspended Williams for being out in the parking lot, sacrificing her obligation to patients. In the face of proof that Williams' union activities were a motive in Respondent's suspension of Williams on April 24, Respondent has not met its burden to prove that the suspension would have occurred even without the presence of the prohibited motive. See *NLRB v. Transportation Management Corp*., supra; *NKC of America*, supra. The suspension violates Section 8(a)(3) and (1) of the Act.

2. The discharge of Valerie Williams; July 10, 1991

a. *July 9, 1991*

Certainly as early 1988, and perhaps at all material times, Respondent has had problems with maintaining coverage of the work floor because employees do not take their lunchbreaks or their workbreaks at assigned times (G.C. Exh. 37, page 3, *Lucille Bell* warning, February 20, 1988). Each nurses aide receives a half hour lunch or dinnerbreak and a 15-minute workbreak in each 8-hour shift. Ordinarily, the assigned mealbreak and workbreak (''first'' or ''second'' meal or work break) appear on each employee's daily shift assignment sheet (G.C. Exh. 37, ibid). Without contradiction, Williams credibly testified, however, that the shift work assignment sheets sometimes do not contain the designated work and lunchbreaks. Where, however, her assignment sheets designated the breaks, Williams testified that she took breaks at those times; where the assignment sheets omitted the designated breaks, Williams would take her lunchbreak or the workbreak whenever she felt she could and notified the charge nurse that she was doing so (Tr. 134–136). She regularly took her breaks in the residential unit, visiting with her friend, Betty Jackson, also a nurses aide. She was never cautioned against this practice.

After 9 p.m. on July 9, 1991, about 2 hours before the end of her shift, Williams told a nurses aide at the desk that she was going on her 15-minute break and made her way to the residential unit, as usual, to speak to her friend, Betty Jackson. To reach the residential unit, Williams took a short cut through the physical therapy room. The lights in the physical therapy room were off but the light in the hallway illuminated the interior of the physical therapy room.

When Williams opened the door, she observed, through an opening in the protective curtain at the entrance of the room, President Scherfel and controller Linda Lopez having ''sex'' on the bed in the room. She closed the door, apparently unnoticed, and returned to her duties on the work floor (Tr. 100). About 15 minutes later, Betty Jackson came to Valerie Williams' work station (Tr. 252) and told her that she had come from the physical therapy room herself (Tr. 247); and told her that she herself had seen them having sex.[12] Williams swore that, at that time, she did not tell Jackson that she too had seen Lopez and Scherfel having sex in the physical therapy room. I do not believe this testimony. Williams' investigatory affidavit (R. Exh. 9) taken by the Board, indicates that she told Betty Jackson, at or around 10 p.m. that she had seen Lopez and Scherfel having sex. I conclude on the basis of my observation of the witnesses, all the testimony concerning her affidavit (Tr. 247–266) and the testimony of Betty Jackson (Tr. 837 et. seq.), hereinafter assessed, that Williams not only exchanged these confidences with Jackson at 10 p.m., but as Respondent's own witness, Betty Jackson corroborates, they again spoke of it at 11 p.m. or thereafter when Williams admittedly told Jackson that she, and others, had seen them having sex. This later conversation occurred, contrary to Jackson's testimony, when both Jackson and Williams were punching out.[13]

Punchout time for Williams was 11:15 p.m. Ordinarily, a few minutes before punchout time, she would go to the parking lot to warm up her car before punching out and leaving for home (Tr. 103). On this July 9 occasion, a few minutes before Williams' punching out, the LPN on duty, Pat Cooper (apparently the acting charge nurse), saw Williams leaving the facility and asked her to discover why a new nurses aide had just left the facility (Tr. 103). Williams told LPN Cooper that she was going to her car in the parking lot and would try to discover why the new nurses aide had left (Tr. 104). LPN Cooper was never called by Respondent to deny Williams' testimony.[14] It stands unrebutted. Williams left the facility and entered the parking lot.

Robert Reeves, the maintenance supervisor, approached her in the parking lot. Reeves, who spent a great deal of time

[12] I find not only that Jackson told this to Williams but that, contrary to Jackson's denial, actually saw it.

[13] While I conclude that Williams' prior affidavit to the Board (R. Exh. 9) impeaches Williams' testimony on this point, I conclude that it does not undermine her overall credibility. Again, I do not credit Jackson's testimony that she did not see Scherfel and Lopez having sex and did not mention this to Williams both at 10 p.m. and at punching out.

[14] It is uncontradicted that Williams' own supervisor was not present (Tr. 104). This would explain why Williams had the conversation with LPN Pat Cooper, the apparent charge nurse at the time. As above, noted, President Scherfel admitted that LPNs, part of Respondent's disciplinary mechanism (Tr. 397–398), are its ''first line supervisors'' (Tr. 399).

in the parking lot (Tr. 106), had been sitting in his car with a female employee from the activities department (Tr. 107). Reeves emerged from his car (Tr. 244) and told Williams that a ''guy'' had told both him and ''John,'' a housekeeper employee, that he had seen Scherfel in the physical therapy room having sex. (Tr. 245). Williams testified that Supervisor Reeves told her that when this ''guy'' reported this fact to him and ''John,'' Reeves sent ''another guy in there to get something and the other guy hollers and says, hey, somebody's in here screwing, and he left'' (Tr. 245). Williams specifically denied telling Reeves that she had seen them as well (Tr. 246). I credit the denial.

Reeves corroborated Williams to the extent of admitting that at about 10:45 p.m., on July 9, he had a conversation with Williams in the parking lot concerning the ''sexual activities going on'' (Tr. 789). Reeves, however, contradicting Williams, said that Williams told him that *she* had seen the sexual activities and that Betty Jackson had seen them too (Tr. 789–790). Contradicting Williams in that conversation, Reeves testified that he had already confronted Lopez and Scherfel and found it impossible that what Williams described would have occurred (Tr. 790). Reeves testified that Williams, in response, said: ''Well, I know what I saw and Betty [Jackson] knows what she saw'' (Tr. 791). Reeves specifically denied that he had seen or even had knowledge of Scherfel and Lopez having sex in the physical therapy room (Tr. 791).

Testimony of Respondent's witnesses, Reeves, Lopez and Scherfel; the alleged earlier incident of July 9, 1990

Reeves testified that as early as 7:30–8 p.m. on July 9 while he was working in the shower room on the first floor he heard a commotion outside. When he went into the hallway to investigate the commotion, he found people talking just outside the room about 200 yards from the physical therapy room. He recognized Williams' voice. Although Williams was speaking to only two other people, Reeves could not recall or identify who the other two people were. He testified that as he approached them, the other two people walked away (Tr. 806). When he asked Williams what the commotion was about, she told him, according to his testimony, that she had seen Lopez and Scherfel engaging in sexual activities (Tr. 783; 807). He testified that he told her: ''I have to see this for myself'' (Tr. 807).

Reeves testified, and Lopez corroborated (Tr. 424–432) that at about 7:55 p.m., Reeves, laughing, approached her and told her that it was amazing how fast she could change her clothes. Lopez asked what he was referring to and Reeves inquired whether she heard what was going around: didn't she know that Lopez was supposed to be in the physical therapy room with Scherfel? He told Lopez that Williams had been in the physical therapy room, witnessed what had occurred, and was '' spreading it throughout the facility.'' When Lopez told him that Scherfel, at that moment, was in the physical therapy room getting a massage from the physical therapist, Lopez refused Reeves' invitation immediately to enter the room and tell Scherfel of this occurrence. Lopez testified, however, that shortly thereafter (Tr. 427, 429), Scherfel emerged from the physical therapy room and approached them while they were standing near the administrative offices, a short distance from the physical therapy room (Tr. 430). Reeves then told Scherfel that there was a rumor going around that he was in the room with Lopez. Scherfel denied this, saying that he was in there getting a message from the physical therapist and that Lopez had never been in the physical therapy room. They then all joked how incredible the entire story was (Tr. 432).

Scherfel, corroborating Lopez and Reeves, testified that from 6:30 to 8 p.m., he was in the physical therapy room getting a therapeutic massage for stress management from ''our physical therapist'' (Tr. 571). The physical therapist, Doreen, is 23 to 24 years old, an employee of a contractor providing physical therapeutic services to Respondent's patients. Scherfel is married. Lopez is married, separated from her husband, and engaged in a contested custody controversy with her husband concerning her child. Scherfel testified that the stress massage was conducted with the fully clothed therapist while he himself was in his underwear with a towel over his genital area. The massage included his thighs up to his crotch, but the towel always remained in place (Tr. 573). The massage also included the use of lubricating oil (Tr. 576).

In any event, Scherfel testified, corroborating Reeves and Lopez, that one of them asked him whether he had heard what was ''going around'' the facility and they told him, first debating with each other who would tell him, that the rumor was that he was having sex with Lopez. When he asked Reeves how he had come to this information, Reeves told him that Williams was ''telling everybody else on the floor'' (Tr. 576). Scherfel said that he, Lopez, and Reeves then ''joked it off'' (Tr. 576). Scherfel said that it was absurd; Lopez said it was ridiculous; and Reeves said he thought so as well. According to Scherfel, he then went home because he was full of oil from the massage (Tr. 576).

Credibility resolutions

I deem it provident to resolve the questions whether there was a 7:30 to 8 p.m. conversation between Reeves and Williams and a subsequent conversation among Reeves, Scherfel, and Lopez at about 8 p.m. regarding the alleged prior conversation between Williams and Reeves in the hallway. Based in large part on the testimony of Respondent's own witness, Betty Jackson, I find that a preponderance of credible evidence fails to show that such conversations occurred: neither between Williams and Reeves between 7 and 8 p.m. in which Williams allegedly told Reeves that she had seen Lopez and Scherfel having sex in the physical therapy room; nor the later conversation among Lopez, Reeves, and Scherfel at about 8 p.m. Independent of the testimony of Respondent's own witness, Betty Jackson, separately analyzed hereafter, I would credit the testimony neither of Reeves, Lopez, nor Scherfel on their oaths.

Robert Reeves

I was immediately struck by what appeared to me Reeves' powers of exaggeration, at least insofar as distance is concerned. While it is possible that he does not know the difference between ''yards'' and ''feet,'' I found that his testimony could not account for distances (Tr. 803; 813). I also found it significant that while he heard a commotion outside the shower room in which he was working, and although he might well have recognized Williams' voice, as he testified,

it struck me as highly improbable that he could discover, while in the shower room, that it was Williams who was causing the commotion rather than the other two unidentified individuals with whom she was engaged in conversation and commotion. Moreover, I was not impressed by his failure to recall who the other two people were. His denial merely of an inability to recall their names does not suffice. His failure to recall whether they were nurses aides or other employees of the hospital who could have been identified and perhaps subpoenaed to corroborate his testimony was noteworthy.

Independent of his demeanor and testimony, I would not credit any of his testimony because, at the time he testified, he was the defendant in a criminal prosecution brought by the State of New Jersey concerning his unlawful possession of a syringe. The complaining party in the criminal prosecution is Respondent. Considering the obvious *leverage* which Respondent can exercise over Reeves and his testimony, including the ability to manipulate or withdraw the criminal charge on favorable testimony, I do not credit his testimony. When linked to the demeanor and credibility defects otherwise described, and balancing his demeanor and credibility against Williams, I have no hesitation in not crediting him.

Linda Lopez

Lopez has the obvious desire, as I saw her sitting at counsel table with Scherfel, to give testimony protective of Scherfel and her own job. Putting aside, however, the moral (regardless of any legal) problem of fornication and adultery with Scherfel, even in this progressive and enlightened age and environment, Lopez has a particular self-interest in avoiding an accusation that she was engaged in immoral sexual activity of the kind described. Although Lopez could not suggest any reason why Williams, with whom she was not on unfriendly terms, would spread such a malicious and false rumor against her (Tr. 442), and in spite of the outward appearance of everybody joking about the matter (according to Reeves', Scherfel's, and her testimony), she admitted to a highly important personal reason for contradicting the alleged sexual activity: at the time of her testimony, she was beginning a custody hearing over her daughter against her husband; and certainly proof of the existence of sexual activity with Scherfel ''if it had gotten out in general public could have severely damaged me'' (Tr. 442). Moreover, she testified that President Scherfel was also upset due in part to his knowledge that this rumor of sexual activity would be very damaging to Lopez (Tr. 443). In view of Lopez' self-interest in preserving her job, her loyalty to Scherfel, preservation of the appearance of morality, and because of the particular necessity of defending against this rumor because of her custody proceeding concerning her daughter, I do not credit Lopez in her testimony concerning the existence of a 7:30–8 p.m. conversation with Reeves and Scherfel.

In addition, her testimony that on the morning of July 10 at least 20 to 25 facility personnel, in a half hour period, spoke to her about the rumored sex incident was highly suspicious. Because Respondent had not produced a single witness to support that testimony, I find that testimony to be incredible (Tr. 438).

Steven Scherfel

I have already alluded to the reasons for discrediting much of Scherfel's testimony. Although the record, as will be further developed, shows further reasons to discredit him, I also discredit his testimony concerning participating in this 8 p.m. conversation with Reeves and Lopez.

I therefore find and conclude, contrary to the testimony of Reeves, Scherfel, and Lopez, that Valerie Williams did not cause a commotion outside the shower room at 7:30 p.m.; did not tell Reeves *at that time* that she had seen Scherfel and Lopez in the physical therapy room engaged in sexual intercourse; and that there was no conversation at about 8 p.m. on July 9 among Scherfel, Reeves, and Lopez (concerning the alleged 7:30 p.m. conversation between Williams and Reeves) relating to Reeves' report that Williams had seen, and was spreading a rumor concerning, a Lopez-Scherfel sexual liaison in the physical therapy room. I find that neither conversation occurred.

Testimony of Betty Jackson

As above noted, some time around and after 11 p.m., Williams had gone to the parking lot to warm up her car and there had a conversation with Reeves concerning Reeves' report to her that he and ''John,'' a handyman, had been told by an eye witness that Lopez and Scherfel were having sex in the physical therapy room. Williams testified that she did not respond to Jackson or, in any event, tell him that she had seen the same thing. Reeves' testimony contradicted her. He said that she told him, at that time, again that she and Betty Jackson had seen the sexual act and that Reeves told her that he had checked on it and that it was impossible. It is ultimately unnecessary to resolve the question of whether Williams admitted to Jackson that she had seen the same thing during that 11 p.m. conversation. If it were necessary to resolve the issue, I would credit Williams and discredit Reeves.

Betty Jackson, a Respondent witness, employed by Respondent from time to time since September 1977 was, at the time of her testimony, working for another employer and on leave-of-absence from Respondent. She testified, however, that she expected her interim employment to cease and that she expected to return to work for Respondent (Tr. 835).

Although Betty Jackson at first insisted that she had only one conversation with Williams on the evening of July 9 (Tr. 818), she thereafter admitted that she had more than one conversation with her (Tr. 837–838). At first Jackson testified, contrary to Williams' testimony, that their second conversation was not when they were both punching out and leaving the facility (Tr. 837) but then testified that she could not ''recall right off hand'' when it occurred (Tr. 837). As will appear below, it is apparent that the second conversation necessarily occurred after Williams' conversation with Reeves in the parking lot at 11 p.m. I therefore conclude, contrary to Betty Jackson's equivocal denial or lack of recollection, that her second conversation occurred after 11 p.m. and therefore at or about the time that she and Williams were punching out, i.e., at about 11:15 p.m. as Williams otherwise credibly testified.

The substance of Betty Jackson's credible testimony was that in a conversation with Williams at about 9:45 p.m. (specifically recalled because she was on her way to obtain insu-

lin for a patient, Tr. 817–818), while she was in the hall going toward the dining room, she met Williams who told her: ''I have something to tell you'' (Tr. 819–820). When Jackson asked what it was, Williams told her: ''I just caught Steve Scherfel and Linda Lopez in . . . the . . . therapy room having sex'' (Tr. 819). Of particular significance, Jackson testified both that Williams told her at 9:45 p.m. that she had just seen this during her lunchbreak (''during that time''; Tr. 819–820), and that Williams was relating this event to Jackson during this same Williams' lunchbreak period which continued through the time of this conversation (Tr. 820). The significance of this Jackson testimony, at the end of the hearing, concerning *when* Williams saw the sex act, was apparent, as hereafter noted.[15]

For the third time, again on cross-examination, she insisted that the conversation occurred on Valerie Williams' lunchbreak (Tr. 821–822). Again, she insisted that the conversation was at about 9:45 p.m. (Tr. 822.)

Contrary to Williams' testimony, Betty Jackson, however, absolutely denied telling Williams that she had seen Scherfel and Lopez having sex in the therapy room. She denied it and explained that she did not see any such thing (Tr. 822–823). She testified that she never saw Scherfel and Lopez having sex nor did she tell anybody that she did (Tr. 823). She also testified that she could not remember any other conversation with Williams that evening (Tr. 823).

The significance of Jackson's testimony follows. On cross-examination, Jackson testified that she generally leaves the facility at around 11:15 p.m. (Tr. 836), sometimes meets and speaks with Williams on those occasions (Tr. 836–838), but denied having a conversation with her at the time they were leaving on the night of July 9 (Tr. 837). She then changed her testimony to say: ''I can't recall right off hand'' whether she had that conversation at the time of punching out (Tr. 837). However, she did finally admit that she had a later conversation, i.e., after 9:45 p.m., with Williams but not when she was leaving the facility (Tr. 837). In any event, however, and of particular significance, Betty Jackson admitted that in some conversation with Valerie Williams on that night, she recalled that Williams told her that she and Supervisor Robert Reeves had talked; that Reeves had told her that he had seen Lopez and Scherfel; and that ''John'' had seen them, too (Tr. 838). It is apparent, therefore, that contrary to Betty Jackson's original denial, she not only had more than one conversation that evening with Williams, but the second conversation, of necessity, had to have occurred *after* Williams' conversation with Reeves in the parking lot no earlier than 10:45 p.m. (according to Reeves' testimony concerning the time of the conversation which he admitted occurred). Notwithstanding that Williams placed it at perhaps 15 minutes later, at about 11 p.m., Williams could *not* have told Jackson, as Jackson's own testimony shows, that Reeves told her that he had ''seen Linda and Steve,'' and that ''John'' had seen them too, *before* the parking lot conversation between Reeves and Williams. Thus, on the record before me, I conclude that Jackson and Williams had more than one conversation on the evening of July 9, 1990; that the first occurred at about 9:45 p.m. and the second around or after 11 p.m.

In the first conversation between Jackson and Williams, when Jackson was trying to obtain insulin for a patient, at about 9:45 p.m., I conclude that, as Jackson credibly testified, contrary to Williams' denial, Williams told her that she had just seen the sex act occurring during Williams' own lunchbreak which lunchbreak was continuing even at the time of this 9:45 p.m. conversation. Since Williams, certainly at that time, would have had no motive, discernable on this record, in providing Jackson, her friend, with a false time when she saw the sex act; and since Jackson, corroborating Williams, testified that Williams told her that she had just seen it during her lunchbreak which lunchbreak was continuing at the time of this 9:45 p.m. conversation, I conclude that Jackson's testimony, corroborating Williams, specifically undermines and discredits the mutually corroborated testimony of Reeves, Scherfel, and Lopez to the extent that their testimony supports the existence of a Reeves-Williams conversation at about 7:30 or 8 p.m. concerning Williams' observation of Scherfel and Lopez in the physical therapy room at that time (close to 8 p.m. on July 9).

In short, there would be no reason for Williams, at 9:45 p.m. on July 9, to tell her friend, Betty Jackson, that during the contemporaneous lunchbreak she had *just seen* Scherfel and Lopez engaging in sex in the physical therapy room if she had actually seen them 2 hours before, at 8 p.m., doing the same thing. Again, there was no reason, on this record, for Williams to have misstated the time of her observation to her friend Betty Jackson. In addition, there is no reasonable question of the accuracy of Jackson's recollection of her first conversation because her recollection was focused on her obligation to get insulin for a patient at about 9:45 p.m.. Similarly, Jackson testified clearly that Williams said, in substance, that she had just seen the sex act during her lunch period which was continuing. Such spontaneous and mutually corroborative testimony, especially from Jackson, a witness called by Respondent, seriously undermines the credibility of Reeves, Lopez, and Scherfel concerning the existence of the 7:30 or 8 p.m. conversation during which Williams allegedly told Reeves that she had just seen Scherfel and Lopez in the physical therapy room having sex. There is no suggestion, much less proof, of Lopez and Scherfel being in the physical therapy room at both 7:30 and 9:45 p.m.

Moreover, Jackson's corroborative testimony supports Williams: that it was Reeves who told her that he and ''John'' had seen Scherfel and Lopez engaged in sex as well.[16] Jackson, of course, could not have heard the substance of what Williams told her in the second conversation until Williams had concluded her conversation with Reeves out in the parking lot at 11 p.m. Jackson's credited testimony necessarily demonstrates not only that their two conversations with friend Williams on the night of July 9, but that the second conversation necessarily occurred after the 11 p.m. parking

[15] On cross-examination, Jackson testified, agreeing with Williams' prior testimony that she, like Williams, sometimes did not have a specific assigned lunchbreak (Tr. 821), and repeated, again, that the conversation occurred during Williams' lunchbreak, not her own (Tr. 821).

[16] Although Jackson's rendition of what Williams told her was not as particularized as Williams' testimony (that Reeves had sent somebody else to observe Scherfel and Lopez in the sex act, and it was not Reeves himself who had seen it), the Betty Jackson testimony on both conversations, placed in context is reliable enough concerning what was said and certainly the timing of her two conversations with Williams.

lot conversation between Reeves and Williams because (Jackson testified) Williams told her that Reeves and ''John'' had seen them too. This Jackson testimony, of course, necessarily discredits Reeves. Jackson testified that Williams said that Reeves told her that he and ''John'' had also seen the sex act. Williams had no motive to lie in that second conversation. To the extent Reeves testified that he never told Williams he had observed them having sex or suggested that he had not sent a ''guy'' to confirm that fact, I do not credit him. While I have not credited Williams' denial of telling Jackson what she had seen in the physical therapy room, to the extent Respondent argues that Williams is a malicious, habitual liar, neither my observation of her, nor the record, supports this argument.

b. *The July 10 discharge*

Scherfel, and particularly Lopez, testified that on the morning of July 10, many of the supervisory and other personnel (Tr. 438–439) of the facility approached them and kidded them concerning what they were doing in the facility the previous night (Tr. 437–438). Indeed, Lopez testified that all of the department heads, over 20 personnel in total, came to her and asked her about the incident. Not only Administrator Gregory Marks and Director of Nursing Long allegedly visited her and asked her about the incident, but also ''everyone else in Administration'' (Tr. 437–438). As above noted, she testified that at least 20 to 25 people came to her and told her that she and Scherfel were having sex the previous night. Although Respondent's vice president and administrator, Gregory Marks, was included in those visiting Lopez to inquire about the sex incident, and although Marks testified in the proceeding, he did not corroborate Lopez' testimony concerning this incident. Most particularly, he was not even called to corroborate Lopez regarding his own inquiry. More important, he was silent concerning the source of any rumor he heard or from whom he heard that Scherfel and Lopez were having sex in the physical therapy room. Although Respondent named several additional inquirers, it failed to call a single witness named by Lopez and Scherfel to corroborate this extraordinary number of prurient persons who visited Lopez inquiring about Lopez' rumored sexual activities on the night before.[17] Of course, they did not identify the source of the rumor.

In one instance, where Lopez cited a named inquirer (Linda Hojnowski), Lopez asked her who told her, but Hojnowski allegedly did not give the name, telling Lopez only that she had heard it on the floor and that everyone was talking about it (Tr. 437). I do not credit such testimony.

That same morning, Lopez expressed her concern to President Scherfel on the effect of the rumors on her litigation concerning custody of her daughter (Tr. 442). Scherfel told her that he shared her upset because of the damaging nature of this situation should it become general public knowledge. Scherfel told her that it was also defaming his character and that he wanted to find out ''where the root of this was'' (Tr. 443).[18]

Apparently following this July 10 alleged conversation between Scherfel and Lopez concerning Scherfel's desire to discover the ''root'' of the problem, Scherfel sought out D.O.N. Long and told her of the rumors going around concerning Lopez and himself having sex and that Williams had started the rumor. Scherfel told Long that he wanted a meeting so that he could discuss the matter with Williams (Tr. 694–695). Consistent with prior practice, Scherfel directed Long to pull Williams' timecard, which would cause Williams to see Long and ultimately to have the meeting. When Williams arrived for her July 10 afternoon shift at about 2:45 p.m., she found her timecard missing from the rack, sought out D.O.N. Long (Tr. 695), and Long told her that Scherfel had asked her to set up a meeting. When Williams told Long that she wasn't going to have a meeting with Scherfel (Tr. 696), Long told her that they had to have the meeting and that she should come into Long's office to await Scherfel's arrival. They entered the office and waited for Scherfel to arrive. At Williams' request, Long paged Betty Jackson and Betty Jackson arrived shortly after Scherfel (Tr. 697). Except for Williams' uncontradicted and credited testimony concerning parts of the conversation in the office that afternoon relating to Williams' union activities, and certain of Scherfel's testimony concerning his first knowledge of Williams' being out in the parking lot at 11 p.m. on the previous evening, the circumstances of this afternoon on July 10 were not in substantial dispute. Long told Williams that the meeting was being called because Scherfel wanted to talk to Williams about the sex matter. Thus, present in the the office was Scherfel, Long, Betty Jackson, and Williams.

Scherfel opened the meeting by asking Williams about the rumors, about Williams making statements that Scherfel and Lopez were in the physical therapy room having sex (Tr. 111, 697; ''what was this stuff that was going around that [Williams] was saying.'' Williams told him that there wasn't anything going around. Scherfel said that he had had *proof* that Williams was going around telling people that she had found him in the physical therapy room having sex with Linda Lopez (Tr. 111). Williams told him that she had not told anyone of that (Tr. 112). At this point, when Scherfel said that he had *proof* that Williams was going around telling everybody that he and Lopez was having sex, Williams told him to bring in his proof (Tr. 112). When Scherfel continued to speak about the sex incident, Williams did not answer him and told him that she did not have to answer him (Tr. 112). Williams, however, did tell him that if he did bring his ''proof'' through witnesses, she would tell the witnesses to their faces that they were liars because she never opened her

[17] Again, I regard Lopez' testimony that at least 20 to 25 supervisors and nonsupervisors inquired of this matter to be false and extravagant. There are only 110 employees employed in the entire facility and it would appear that not more than half were working on the first of three shifts. Like Reeves' exaggeration of distances, which would make Respondent's facility greater in size than two or three football fields (600 feet in length from one internal point to another), I regard Lopez' testimony concerning the number of employees inquiring of the incident to be vastly exaggerated, if there were any at all.

[18] This Lopez testimony was incredible when given and painful on rereading. How could Scherfel on the morning of July 10, be puzzled concerning ''where the root of this [rumor] was'' (Tr. 443), when, on the evening of July 9, not more than 12 hours before, Supervisor Reeves allegedly told him (and Lopez) that Valerie Williams had seen them in the sex act in the physical therapy room and ''was spreading it throughout the facility'' (*Lopez*, Tr. 427) and ''that Valerie Williams was telling other employees on the floor that this was going on'' (*Scherfel*, Tr. 575).

mouth about the incident (Tr. 114). Scherfel made no response.

At this point, Williams asked Long if she had called the meeting and Long said she had not called the meeting. Williams then asked Long if she could leave and Long said she could leave. Williams then left the office and went to the nurses' desk. At this point, Scherfel came out of the office, into the hall ''hollering'' (Tr. 114), and told Williams to get back in the office because it was he, Scherfel, who called the meeting (Tr. 115). He then added: ''Since you want to be on the committee board, you're going to be on my committee board'' (Tr. 115).

Williams then returned to the office with Scherfel, telling him: ''First of all, the Union don't have nothing to do with this. Its between me and you, no one else'' (Tr. 115). Scherfel was still ''hollering'' at Williams and Williams said: ''Wait a minute. First of all, you don't holler at me. I'm not your wife and you're not my husband or my mother. My mother don't even holler at me.''

At this point, Scherfel told her that her personnel records showed that she had abused a patient. Williams told him to bring in the file which showed a record of patient abuse (and added that, if a record showing patient abuse was produced, it would be a forged record (Tr. 115–116)). Scherfel sent for the file. While awaiting the file, Williams asked Long whether she had ever heard anyone say that Williams had abused a patient. D.O.N. Long said that she had never heard of such a thing and, when the file arrived, she asked Scherfel to excuse Jackson and Williams and have them leave the room while she spoke to Scherfel privately (Tr. 116). Jackson and Williams then left the room. Scherfel sent for Reeves and had the conversation described below. Later, after Reeves left, Williams reentered the office and saw Scherfel investigate the file. Long told Scherfel that there was no record of Williams having abused a patient. Scherfel apologized to Williams.

During the course of the conversation, as described below, Williams told Long and Scherfel that she had gone out to the parking lot, talked to Bob Reeves out there, and that Reeves told her of the sex incident. Scherfel asked her what she was doing out in the parking lot because that wasn't her break time. He told her it was an unauthorized break and Williams told him that she had gone out to her car (Tr. 699).[19] Scherfel admitted that he assumed that Williams' visit to the parking lot was an unauthorized break. Williams apparently failed to tell him of her conversation with and notification to LPN Pat Cooper.

Thus, it was when Valerie Williams earlier told Scherfel to bring in his proof of Williams as the source of the rumor, that Scherfel testified that he was prepared to do that and told her that Bob Reeves was going to come down to their meeting and tell them all what Williams had told him the previous night. Scherfel said that he would not be that stupid to have sex with an employee in an unlocked room. Williams told him that it was not her concern; what he did was his own business and that she had not told anybody of any sexual activity. It was then that Scherfel asked her whether, if she did not start the rumor how did she hear of it, and she told him that Reeves had told her in the parking lot at 10:45 p.m. the prior night. It was at this point that Scherfel said that she had once again violated company policy with regard to taking breaks.

At this point, Reeves knocked on the door and entered the office (Tr. 597).

Reeves testified that when he entered Long's office, he found Long and Scherfel alone there (Jackson and Williams had been sent out while Long and Scherfel examined her file for the patient abuse record); that Scherfel asked him if there were rumors about him and Lopez having sex; when Reeves answered that there were, Scherfel asked from whom did he hear the rumors and Reeves told him it was from Valerie Williams. Reeves then testified that he recalled nothing else, but, responding to a further question recalled that Scherfel did ask him *when* he had spoken with Williams. Reeves testified:

> He did ask me, because he didn't have prior knowledge, having left the facility the previous night around 8:00 or 8:30 or whenever they left . . . . I told him we were talking out in the parking lot last night. . . . (Tr. 793–794.)[20]

[19] I discredit Long's testimony that Williams said that she could go on a break when she wants to and where she wants to (Tr. 699). Had Williams made such a remark, I am confident that Scherfel would have testified concerning it and the insubordinate tone that it carried. There was no such Scherfel testimony.

[20] As above noted, Scherfel testified that after Williams denied spreading the rumor (Tr. 590) and *before* Reeves was summoned to the room (Tr. 590–591), and after Scherfel told her that Reeves was going to appear and tell them all what Valerie Williams had said to him (Tr. 591), he asked her who had started the rumor if she had not (Tr. 595). According to Scherfel, she then told him that she had heard the rumor from ''Bob Reeves in the parking lot''; and when he asked her when, she said at 10:45 in the previous night. Scherfel then asked her: ''what are you doing in the parking lot at 10:45 in the evening?'' Williams allegedly answered that she was on break and that Scherfel responded that he did not believe that breaks were permissible at that time; and that once again she had violated the policy with regards to breaks. It was after this, according to Long's (Tr. 700–702) and Scherfel's testimony, that Reeves entered the office. As I heard Reeves' testimony, as above-indented, he was not only answering the question of when his conversation was, but volunteered the importance of *why* Scherfel asked him *when*. He was underlining for ''e,'' through the above-indented voluntary, additional explanation, the fact that, when Scherfel spoke to Reeves in Long's office, it was only through Reeves that Scherfel discovered that Valerie Williams had been in the parking lot at 10:45 p.m. on an allegedly unauthorized work break: ''He [Scherfel] did ask me, because he did not have prior knowledge, having left this facility the previous night around 8:00 or 8:30 or whenever they left.'' Aside from the unexplained problem of how Reeves knew that ''they left'' at 8 or 8:30 p.m., I was immediately struck, at the hearing, and again on rereading the transcript, by Reeves' explaining to me the *reason* that Scherfel had asked him *when*, on the previous night, he had spoken to Valerie Williams in the parking lot. Reeves' volunteered explanation to me was that Scherfel asked him that question ''because he did not have prior knowledge [that Williams was in the parking lot].'' (Tr. 794.) The gravamen of Reeves' testimony thus is that he was the source of Scherfel's knowledge. But Long testified that Williams had already admitted this to Scherfel *before* Reeves entered the office (Tr. 698–700). Scherfel did not realize the potency of Williams' admission until after D.O.N. Long told him he was mistaken in his accusation against Williams for *patient abuse*. When Reeves thereafter repeated that Williams was in the parking lot, Scherfel dismissed Reeves, recalled Williams, seized on Williams being out in the parking lot, and discharged her for that reason. Again, after Williams told Scherfel she would call his witness to her

Continued

Scherfel then permitted Reeves to leave without bringing Williams into the office to confront him.

In any event, as noted, Reeves left. Immediately as Jackson and Williams were permitted back in the room, D.O.N. Long told Scherfel that he was mistaken in accusing Williams of having been previously disciplined for *patient abuse* and that another nursing assistant had been involved in the matter (Tr. 596, 700). When Williams returned, Scherfel told her: ''I made a mistake; Long told me you were not involved [in patient abuse]'' (Tr. 700). Long testified that at this point, Scherfel *returned* to the problem of discussing Williams' having been out in the parking lot on an unauthorized break (Tr. 700). Scherfel and Long then testified that Scherfel told her that she had broken the same rule before, had been suspended before and that this indicated the necessity for terminating Williams because of her being on an unauthorized break which put patients in jeopardy (Tr. 598; 701).

Scherfel then directed Williams to follow him to Administrator Marks' office and there he wrote up the dismissal form with an accompanying explanation (G.C. Exhs. 4(a) and (b)).[21]

After he presented Williams with the termination notice, he asked her if she had any questions and when she told him that she did not, he told her that he felt bad ''because when [Valerie Williams] is working, she is an excellent nursing assistant, and that it was a shame that, because she did not follow the rules, that I was forced to terminate her'' (Tr. 598). Scherfel testified that the reasons he discharged Williams were no different than those reasons which appear on the termination notice (G.C. Exhs. 4(a) and (b)). In particular, when asked whether the rumors which Williams allegedly spread played any part whatsoever in the decision to terminate her, Scherfel answered:

> The rumors did play a part in the sense that they made me irritated and angry, and Valerie Williams *gave me the hook* . . . to terminate her because she was out in the parking lot.[22] [Emphasis added.]

rumor-mongering ''a liar,'' Scherfel did not permit Williams to confront Reeves (Tr. 598); and it was immediately after Reeves left Long's office that Williams and Jackson were permitted back in the office and Scherfel told Williams that she was going to be dismissed for the repeated infraction of an unauthorized break (Tr. 598). Defeated on ''patient abuse,'' Scherfel jumped on the next available basis: ''unauthorized break,'' to discharge Williams. He thus seized on Reeves' repetition of what Williams had already admitted. This is the stuff of pretext *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 (2d Cir. 1985) (varying explanations for termination suggests pretext).

[21] The termination notice lists Williams admission that she had been in the parking lot at 10:45 p.m. on July 9, 1991; left her patients under the care of unknown nursing assistant and went, out to her car; that on March 22, 1991, she had been counseled and suspended for 3 days for a similar offense at which time she had been warned that a further offense would require termination. In sum, Scherfel wrote that: ''for leaving her assigned patients and ignoring her previous warning and suspension, Valerie Williams is terminated.''

[22] Reeves testified that he had long heard rumors concerning Scherfel and Lopez and recalled telling Williams that he believed ''everybody at the facility is aware of rumors about Steve and Linda Lopez since the time that I got there . . . in September 1990.'' (Tr. 809–810.)

Discussion and Conclusions

a. *The prima facie case*

There can be no dispute that Respondent had *knowledge* of Valerie Williams' support for the Union and, indeed, her position as a member of its collective-bargaining negotiation committee. With regard to *union animus*, I have found that Respondent's president, Steven Scherfel, 3 weeks before Respondent unlawfully suspended Valerie Williams, in his speech to at least 15 of Respondent's nursing assistants, violated Section 8(a)(1) of the Act by telling them, inter alia, that they had been doing better before the Union was selected; that the Union was trying to cut their benefits; and that but for the Union, the atmosphere at the facility would be like a family. I have also found that, as alleged, in early April 1991 (Tr. 513), Administrator Marks, in violation of Section 8(a)(1) of the Act, told Williams, in order to discourage her from supporting the Union, that the employees could not get anything with the Union in the facility; that they would be better off without the Union; and they would get what they wanted without the Union. Vice President Marks is the supervisor ranking in corporate authority immediately beneath Scherfel, Respondent's chief executive officer at the facility. I find that Scherfel's generalized unlawful statements and Marks' subsequent unlawful statements, directed particularly at bargaining committeewoman Valerie Williams, demonstrate not only Scherfel-inspired union animus, but union animus focused on Valerie Williams as a representative on the union bargaining committee who regularly faced Gregory Marks as her Respondent counterpart on the bargaining committee.

Any doubt with regard to the strength of President Scherfel's own conscious resentment of Valerie Williams' position as an unswerving union supporter and, indeed, as a member of the Union's bargaining committee, may be found in the *undenied* and credited Williams' testimony. In the July 10, 1991 discharge interview itself, in the heated conversation in the hallway or while reentering D.O.N. Long's office, President Scherfel, ''hollering'' at Williams, said:

> Valerie get back in the office because I'm the one [that] called the meeting. . . . Since you want to be on the [Union negotiating] committee board, you're going to be on my committee board.

Equally undenied is Williams' further credited testimony (Tr. 115) that she answered Scherfel, returning to the office: ''Wait a minute. First of all, the Union don't have nothing to do with this. Its between me and you, no one else.''

This undenied testimony demonstrates that, in the midst of the discharge interview itself, Scherfel, boiling over, expressed specific resentment concerning Williams' status as a union bargaining agent. Whether viewed separately or in conjunction with his March 27 generalized unlawful expression of union animus and Gregory Marks' later singling out Williams for a personalized expression of union animus, this outburst in the discharge interview against Williams' status as a union bargaining committeewoman is decisive. It necessarily supports the inference that her status as a bargaining committeewoman, conduct clearly protected under Section 7 and Section 8(a)(3) of the Act, was not only ''a motivating factor'' in Scherfel's decision to discharge Williams, thus

creating a prima facie case, *Inland Steel Co*., 257 NLRB 65, 68 (1981), enfd. 681 F.2d 819 (7th Cir. 1982), but, alone, is ''especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated,'' *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). The outburst in the discharge interview itself eliminates, for all practical purposes, the alternative defense to rebutting the prima facie case: that Williams would have been discharged regardless of her union activities. *NKC of America*, 291 NLRB 683 (1988).

The fact that D.O.N. Long testified (Tr. 704–795) that she did not ''remember him mentioning the Union at all''; that any mention of a committee or someone being on a committee was ''not to [her] knowledge''; and that the Union was not mentioned ''during the entire time that I was present'' (Tr. 705), indicates either that she heard no mention of the ''committee'' or ''Union'' because the Williams-Scherfel conversation was out in the hall; or because the exchange was delivered with such acrimony, as the disputants were returning to her office, that she reasonably did not hear them during the ''hollering.'' If her veracity was involved, bearing in mind her protective attitude, I would not credit either her lack of recollection or her failure to be present at the time the words were used. More significant than D.O.N. Long's lack of recollection and the greater probability that she did not hear the exchange because these words were yelled out in the hall, is the fact that President Scherfel failed to deny Williams' testimony that this conversation occurred.

I am constrained, therefore, to conclude, on the basis of my independently crediting Williams on the basis of my observation of her demeanor, on President Scherfel's failure to deny her testimony, and on D.O.N. Long's equivocal testimony concerning the event, that General Counsel proved a prima facie case: that ''a motivating factor'' causing Respondent, on July 10, 1991, to terminate Williams' employment was of her support of, and her participation in, the bargaining activities of, the Union. Such a factor in the termination causes the termination to be prima facie in violation of Section 8(a)(3) and (1) of the Act, as alleged. *Wright Line*, 251 NLRB 1083 (1980).

b. *The defenses; veracity*

I have credited Jackson and discredited Williams' denial of telling Jackson at 10 p.m. on July 9, that she had just seen Lopez and Scherfel having sex. There is no evidence that Williams spread the rumor later through Jackson or directly by telling others. Reeves' and Scherfel's testimony showing Williams as telling ''everybody'' is not credited. Lopez' testimony, of 25 persons telling her of the rumor, presented the opportunity to have a single such person testify that Williams was the source of the sex incident rumor. No such person was produced.

As a more general matter, however, in viewing the credibility of Respondent's witnesses Scherfel, Lopez, and Reeves, it is difficult, on the basis of this sizable record, to underestimate their credibility. Williams, herself, was not a model of probity. D.O.N. Long initially favorably impressed me with calm, straightforward demeanor and therefore her credibility. It was only after considerable testimony that I found that, particularly in her absolutely firm contradiction of Scherfel's testimony concerning Scherfel's role in unlawfully suspending Williams in April 1991, she was simply protecting his (and her own) interest and less than credible. I have elsewhere ascribed her motive as that of protecting her employer and, indeed, perhaps protecting her own job. Similarly, I initially found Betty Jackson to be a credible witness although I do not credit her testimony that, in neither their July 9, 10 p.m. conversation or in their post-11 p.m. conversation, did she *tell* Valerie Williams that she had seen Lopez and Scherfel in flagrante. I also do not credit her recollection insofar as she at first denied having a further conversation with Williams (after Williams' 11 p.m. conversation with Reeves in the parking lot). If Jackson, on this record, had any intention of returning to employment with Respondent, her denial of having seen Lopez and Scherfel in the very act and her reticence in discussing conversations with Williams (stating that she had seen them in flagrante), while incredible, is entirely understandable. See *NLRB v. J. Coty Messenger Service*, supra (former employee's ability to regain job depends on remaining in employer's ''good graces'').

Hundreds of pages of testimony were devoted to the questions of Lopez and Scherfel engaging in sexual activity and Williams' participation, indeed her initiation, in spreading the rumor of Scherfel and Lopez being engaged in illicit sexual activity on Respondent's premises on July 9, 1991. It is difficult to believe, on this record, that President Scherfel failed and refused to rest the *rationale* for the Williams' discharge entirely on the basis of his good-faith belief (which is nevertheless not supported in this record) that she initiated and, in any case, substantially participated in the spreading of an unfounded rumor of his engaging in sexual activity with Lopez. As a matter of law, even if Scherfel were proved to be incorrect in his conclusion that Williams was the source of the rumor, it might well have been at least *arguable* that this legally innocent rationale could survive Board scrutiny and meet the burden placed on Respondent, in the presence of a prima facie case, to convince the trier of fact that Respondent would have terminated Williams even in the absence of her position as a union bargaining committeewoman. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., supra; *Inland Steel Co*., supra; *Klate Holt Co*., 161 NLRB 1606, 1612 (1966).

In the end, however, Scherfel insisted that the reasons for his discharge of Williams appeared on the termination notice which he drafted (Tr. 602; G.C. Exhs. 4(a) and (b)); and that the rumors of illicit sexual activity which Williams allegedly initiated, while they irritated him and made him angry, merely ''gave [him] *the hook* . . . to terminate her because she was out in the parking lot'' (Tr. 606). As Scherfel insisted that the reason for the discharge was that Williams, contrary to Respondent's rules, was in the parking lot, having abandoned her patients for that period, I will not substitute my judgment for his judgment as to what his best defense is. The Board has long frowned on administrative law judges attempting to justify their own rationalization of the evidence on theories of defense which a respondent refuses or fails to advance. *Inland Steel Co*., supra; *Edwards Restaurant*, 305 NLRB 1079 fn. 1 (1992), ''Even if those incidents did occur, [neither of the employer's witnesses] testified that these were the reasons for [the] discharge.'' Moreover, the Board has established the rule that merely because an employer *could*

have discharged an employee for breach of a work rule, the real issue is whether the employer *would have* discharged the employee for the particular conduct alleged, *Structural Composites Industries*, 304 NLRB 729 (1991); *Equitable Gas Co*., 303 NLRB 925 (1991).

Bearing in mind, therefore, that the instant prima facie case consists, inter alia, of a termination interview itself redolent with personalized union animus by the chief executive officer against the employee being discharged, *Turnbull Cone Baking Co*, supra; *WordsWorth*, 307 NLRB 372 (1982), and, bearing in mind, that in the presence of such an unrebutted prima facie case, the burden then shifts to the employer, *NKC of America*, supra, to demonstrate that it would have terminated Williams even in the absence of her protected conduct, under the *Wright Line* rule. (*Wright Line*, supra; *Transportation Management Corp*., supra.) The following factors persuade me that Respondent has not successfully shouldered that burden:

(a) *Respondent's Records; Unique Discipline*: The General Counsel argues that no employee had ever been discharged for being out in the parking lot. Of 29 terminations between 1987 and 1991 (from records subpoenaed by the General Counsel) there is no indication of any employee having been terminated for being out in the parking lot. While there is no question that Respondent's work rule prohibits employees' leaving the building during shift hours for other than facility business and requires them to punch out and gain prior approval from the supervisor (addendum 1, p. 18, R. Exh. 3, personnel manual), none of the more than two dozen terminations, in the period 1987 to 1991, reflects a termination because of being out in the parking lot or being out of the building for a few minutes. Rather, the terminations are based on excessive absenteeism (Keither Cuff), walking out of the facility and never returning to work (Denise White), resignations (Rhonda Council), poor work habits (Sally Easterling), sleeping in a patient's bed (Stacy Dixon), sleeping on the job (Danielle Dickerson), and similar malfeasance. This is not to say that in the presence of the peculiar and specialized employee disciplinary problems of a health care institution, any employee is privileged to simply leave her patients and the building especially on personal business as did Valerie Williams on the evening of July 9 (warming up her car). I conclude, consistent with Respondent's argument, that an unauthorized absence from duty, necessarily leaving the care of patients, especially in the face of a lawful prior unheeded warning, would ordinarily constitute grounds for a lawful discharge. Here, however, the prior warning was not lawful and Williams, with LPN Cooper's knowledge and approval, was in the parking lot, inter alia, looking for a missing nurses aide. This was not dissimilar to A.D.O.N. Aslarona's view of Williams being in the parking lot to retrieve her pen.

(b) *Respondent's knowledge, condonation, or approval of Williams' conduct leading to suspension and discharge*: Respondent failed to call as its witness its Assistant Director of Nursing Martha Aslarona. I need not draw an adverse inference for this failure since Valerie Williams' credible testimony is undenied with regard to her conversation with Aslarona at 3 p.m. on April 22, 1991. After that conversation, Aslarona, at the direction of President Scherfel, and contrary to Aslarona's practice and judgment wrote her up adversely for being in the parking lot. I have already found that Aslarona's knowledge of Williams' repeated going to her car in the parking lot, failing to independently reprimand or discipline her for those acts, together with her statement of a preference not to do so except for the intervention of President Scherfel, demonstrates *condonation or approbation*, or an interpretation of the personnel manual rule (against being outside the building except with the approval of the supervisor) implying tacit permission to do so. Respondent may not now be heard to complain that on the evening of April 22, 1991, Valerie Williams violated its rules against leaving the facility without supervisory permission. In addition, the number of employees regularly out in the parking lot, according to Williams' uncontradicted testimony implies Respondent knowledge and tacit acquiescence. Inez Mitchell, for instance, during worktime visits her car in the parking lot to get candy two to three times per week (Tr. 340–341). Under these circumstances, a 3-day suspension, as I have found, for such conduct demonstrates unique punishment and disparate treatment.

Similarly, when Williams went to her car on July 9, LPN Cooper knew of Williams destination and not only failed to admonish against it, but directed her to look for the missing aide.

(c) *Doctoring the records*: On the other hand, Respondent's failure to call A.D.O.N. Aslarona as a witness requires an adverse inference because of her failure to explain her ''doctoring'' of the document she drafted on the evening of April 22 which led both to Williams' suspension of April 24 and the discharge of July 10, 1991. Williams' uncontradicted and credited testimony (Tr. 225) that the final sentence on Aslarona's adverse writeup was not on the document when she signed it, and D.O.N. Long's testimony that the handwriting of that last sentence (''Employee had been counselled regarding unauthorized breaks,'' G.C. Exh. 3(a)) was Aslarona's, raises the questions *when* and *why* Aslarona placed it there. The uncontradicted and credited Williams' testimony and Respondent's own records, in evidence, demonstrate that the final sentence was a false statement because Williams had never been counseled regarding unauthorized breaks prior to April 22, 1991. The subsequent addition of this false statement on the April 22 Aslarona memorandum denotes that Williams was already a repeat offender concerning unauthorized breaks. Since this document played a significant part in, and was a basis for, her July 10 discharge, according to both Scherfel's testimony and his memorandum drafted at the discharge interview (G.C. Exhs. 4(a) and (b)), it follows that a ''doctored'' document was used and was a motivation for the discharge of July 10. As might be expected, the Board does not view with favor defenses based on documents that have been ''doctored'' or ''tampered with'' which form a basis for subsequent discipline of employees. Compare *WordsWorth*, supra, with *Quebecor Group*, 258 NLRB 961, 972 (1981). To base a discharge on a prior unlawful discipline and a doctored document makes the discharge unlawful. *Quebecor Group, Inc*., supra; *Davis Electrical Constructors*, 291 NLRB 115, 133 (1988).

(d) I have already found that Respondent, with knowledge of Williams' repeated visits to her car in the parking lot, imposed unexpected and disproportionately severe discipline on Williams in April in suspending her for 3 days. A.D.O.N. Aslarona's response to Williams' repeated acts demonstrated either *condonation*, *permission*, or an interpretation of the

rules concerning leaving the facility not unfavorable to Williams' conduct. Moreover, the testimony of D.O.N. Long and Scherfel demonstrates that they never heard of an employee being disciplined for being out in the parking lot. Lastly, Williams' uncontradicted and credited testimony is that at the end of the termination interview on July 10 she told Scherfel that she was incredulous that he was going to terminate her for going to her car while ''everybody else goes to their car'' (Tr. 302; 303). Williams further testified that Scherfel did not address this question or attempt to deny that he was according her severe discipline when other employees engaged in the same conduct without discipline. He merely complimented her as an employee and said that he had to ''let her go'' because she broke the rules (Tr. 303–304). Scherfel, if this discipline was evenhanded, was obliged to deny Williams' assertion that she was being singled out for unique, severe discipline.

(e) *Pretext: ''Hooks'' and False Testimony*: I was impressed with Scherfel's testimony that it was Valerie Williams' admission (during the discharge interview) that she had been out in the parking lot at 10:45 p.m. that provided him with the ''hook'' to discharge her. Again, it is significant that Williams admitted this to Scherfel before Reeves entered the room, and before Scherfel accused her of patient abuse. In the presence of a prima facie case, the necessity for Scherfel to find a ''hook'' on which to peg the discharge, like looking for ''some reason'' to discharge an employee, quite reasonably gives rise to an inference of pretext and unlawful motivation, e.g. *Independent Stations Co*., 284 NLRB 394 (1987). Scherfel expressly denied that he fired Williams for initiating or spreading the sex rumor. On the basis of above-cited Board precedent, *Structural Composite Industries*, supra; *Edwards Restaurant*, supra; *Equitable Gas Co*., supra, and since Scherfel was searching around for a reason to discharge her, having abandoned ''patient abuse,'' after failing to confront her with Reeves (although he threatened to bring in Reeves to show that she was the source of the rumor), Scherfel's overall conduct shows that Williams' being out in the parking lot was a pretext. Williams had already admitted being out in the lot with Reeves and Scherfel ignored the admission, preferring to accuse her of patient abuse as the ''hook'' to discharge her. When that ''hook'' collapsed, and Reeves thereafter repeated to Scherfel that Williams had been out in the parking lot, Scherfel jumped on it as a new ''hook.''

In addition to the ''hook'' pretext and with both the suspension and discharge for being in the parking lot accompanied by supervisor knowledge and acquiescence that Williams was not on a frolic, there are the following facts, which underine the bona fides of the defense:

There was a false statement (that Williams had been counseled for unauthorized breaks) appended to the otherwise unlawful suspension memorandum of April 24, 1991, the addition of which remains clouded because of Respondent's failure to explain it through calling its supervisor, A.D.O.N. Aslarona.

There is D.O.N. Long's false testimony that Scherfel played no part in the suspension of Williams. There is Lopez, quoting Scherfel, having Scherfel seeking the source of the spread of the rumor when Reeves allegedly told them both, 12 hours before, that it was Williams who was the source of the rumor of sexual activity. There is Betty Jackson's testimony—Respondent's witness— demonstrating and corroborating Williams' truthful testimony: that in a conversation between Williams and Jackson necessarily *after* their first conversation of 9:45 p.m., at a time when Williams had no motivation to invent a story, Williams told her that Reeves told her that he had seen Lopez and Scherfel engaged in sex and that ''John'' had seen them too (Tr. 838). Contrary to Reeves testimony, he had no 7:30–8 p.m. conversation with Williams in which Williams said she had seen Lopez and Scherfel having sex.

Under these circumstances, in an analysis of the false testimony of and certain admissions by Respondent's witnesses, undenied testimony of the General Counsel's witnesses, Respondent's failure to call other witnesses, and the reasonable inferences to be drawn therefrom, it is clear that Scherfel having abandoned ''patient abuse,'' returned to Williams' being in the parking lot as a pretext to discharge her. The real motive for the discharge must lay elsewhere. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). I specifically do not credit Respondent's defense that Scherfel discharged her because she was out in the parking lot on an unauthorized break. He suspended her on April 24 because he saw her in the parking lot speaking to, and receiving literature from, union agent Rivera. He discharged her on July 10 on a trivial pretext because, as he yelled, of his underlying resentment against Williams being on the Union's bargaining committee.

CONCLUSIONS OF LAW

1. At all material times, 1115 Nursing Home and Hospital Employees' Union, a Division of 1115 Joint Board (the Union), has been the exclusive certified collective-bargaining representative of a unit of certain employees of Respondent within the meaning of Section 9(a) of the Act.

2. By suspending on April 24, 1991, and discharging on July 10, 1991, its employee, Valerie Williams, because she engaged in union and other protected activities, and in order to discourage employees from engaging in such activities, Respondent has unlawfully discriminated against her and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. Respondent, on March 27 and April 2, 1991, in an effort to discourage them from supporting the Union, by telling its employees that (a) they were doing better before the Union was selected; (b) if it were not for the Union the atmosphere at the Cherry Hill facility would be like a family; (c) that the Union was trying to cut their vacation time and health benefits; (d) that they could not get anything with the Union present in the facility; (e) that they would be better off without the Union; and (f) that they would have what they wanted without the Union, Respondent violated Section 8(a)(1) of the Act.

4. Respondent has not committed any other unfair labor practices.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend to the Board that it order Respondent to cease and desist and to take certain affirmative action to effectuate the policies of the Act. In addition to posting notices

which will prevent the repetition of Respondent's independent violations of Section 8(a)(1) in the statements of President Scherfel and Administrator Gregory Marks, I shall recommend that Respondent expunge from its files the April 24 suspension memoranda, directed to Valerie Williams, and all reports and other documents concerning such suspension; and also to expunge from its records all memoranda, reports and other documents dealing with her July 10 discharge. I shall also recommend that Respondent notify Williams, in writing, that this action has been taken and that those documents will not support any further discipline against her. Furthermore, I shall recommend that Respondent offer to Valerie Williams immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and any other rights and privileges previously enjoyed, and to make her whole for any loss of earnings and benefits suffered because of the unlawful 3-day suspension on or about April 24 through 26, 1991, and because of her unlawful termination commencing July 10, 1991, less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Cherry Hill Convalescent Center, Inc., Cherry Hill, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against its employees in order to discourage them from supporting 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, or any other labor organization, or because its employees engage in activities protected by Section 7 of the Act.

(b) Telling employees that they were doing better before the Union was selected; that if it were not for the Union the atmosphere at the Cherry Hill facility would be like a family; that the Union was trying to cut employee vacation time and health benefits; that they could get what they wanted without the Union; that they could not get anything with the Union present in the facility; and that the employees would be better off without the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Valerie Williams immediate and full reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole, with interest, for any loss of earnings and benefits she may have suffered as a result of her unlawful suspension of April 24 and unlawful termination of July 10, 1991, in the manner set forth in the section of this decision entitled ''The Remedy.''

(b) Expunge and remove from its files any memoranda, records, or other references to the unlawful Valerie Williams suspension of April 24, 1991, and the unlawful Valerie Williams discharge of July 10, 1991, and notify Valerie Williams, in writing, that this has been done and that these disciplinary actions will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cherry Hill, New Jersey, copies of the attached notice marked ''Appendix.''[24] Copies of said notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, suspend, or otherwise discipline employees because they engage in union or concerted activities for the purposes of collective bargaining or other mutual aid or protection in the exercise of their rights under the National Labor Relations Act.

WE WILL NOT discourage employees from supporting 1115 Nursing Home and Hospital Employees Union, Division of 1115 Joint Board, (or any other labor organization), by telling them that they were doing better before the Union was selected, that if it were not for the Union, the atmosphere at the Cherry Hill facility would be like a family, that the Union was trying to cut their vacation time and health benefits; that they could not get anything with the Union present at the facility, and that the employees would be better off without the Union or would get what they wanted without the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Valerie Williams immediate, full, and unconditional reinstatement to her former position of employment or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights or privileges; and WE WILL make her whole with interest, for any wages or other benefits she may have lost as a consequence of our unlawful April 24, 1991 suspension of her and our unlawful July 10, 1991 discharge of her.

WE WILL notify her that we have removed and expunged from our files any reference to her unlawful suspension and discharge and that these memoranda of discipline will not be used against her in any way.

CHERRY HILL CONVALESCENT CENTER, INC.